IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Can the annexation of vacant land or land populated by one white family by a municipality with no black voters deny black voters the right to vote on account of race or color?

2. Can the annexation of vacant land or land populated by one white family be invalidated by a subsequent failure to annex land populated by black persons, where the failure to annex would not lead to a retrogression in black voting rights, but annexation of the land populated by blacks would lead to a retrogression in their voting rights?

3. Did the City of Pleasant Grove bear its burden of proof of showing that the annexation of Pleasant Grove Highlands would be economically disadvantageous by proving that revenues derived from the annexation of Pleasant Grove Highlands could not reasonably be expected to exceed between 14% and 28% of increased expenditures?*

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*The City of Pleasant Grove and the United States of America were the only parties to the proceedings before the United States District Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Appellant requests that the Court accept jurisdiction of this appeal and reverse the judgment below.

OPINION BELOW

The decision of the United States District Court for the District of Columbia, dated August 3, 1983, denying appellant's motions for summary judgment (App. B) is reported at 568 F. Supp. 1455 (D.D.C. 1983). The decision of the United States District Court for the District of Columbia dated October 25, 1985, denying appellant's claim for declaratory relief (App. A) is not yet reported.

JURISDICTION

This is an appeal from the decision of a 3-judge court convened pursuant to Title 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, denying a request for a declaratory judgment that certain proposed annexations did not have the purpose or effect of denying or abridging the right to vote on account of race or color, (App. A and C).

On December 19, 1985, appellant filed with the United States District Court for the District of Columbia a notice of appeal to this Court. (App. D).

This Court has jurisdiction under 42 U.S.C. §1973c to review the decision by way of appeal.

STATUTE INVOLVED

Section 1973c of Title 42 of the United States Code provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect

> shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney

General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. [Emphasis in original text]

STATEMENT

The City of Pleasant Grove (hereinafter "Pleasant Grove") is a municipal corporation located in Jefferson County, Alabama. Although Pleasant Grove has

a few black residents, thirty-two (32) out of an approximate population of 7,100 as of October, 1981, at the time the annexation decisions in question here were taken all the registered voters were white.

On May 3, 1971, the Council of the City of Pleasant Grove voted to annex by city ordinance a 40-acre parcel to the north of Pleasant Grove inhabited by one extended all-white family consisting of fourteen (14) persons named Glasgow (the "Glasgow Addition"). On February 5, 1979, the Council of Pleasant Grove voted to annex approximately 450 uninhabited acres to the west of the city (the "Western Addition"), 50 acres of which were already the city's property. State Senator Mac Parsons was willing to introduce a bill annexing the land to Pleasant Grove in the Alabama State Senate only because the land in question was uninhabited. After unanimous consent by the Jefferson County delegation, the bill was passed by the Alabama legislature and signed by the Governor on July 17, 1979.

In April, 1979, approximately seventy-nine (79) registered voters from an area known as Five-Acre Road and an area then known as West Smithfield Manor which later changed its name to Pleasant Grove Highlands (hereinafter "Pleasant Grove Highlands") petitioned for annexation to Pleasant Grove. The inhabitants of these areas were black persons. Pleasant Grove never granted this petition.

After pre-clearance of the Western Addition annexation was denied by the Civil Rights Division of the Department of Justice (hereinafter the "Government"), Pleasant Grove, on October 9, 1980, filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment

that the annexation of the Western Addition did not have the purpose nor would it have the effect of denying or abridging the right to vote on account of race or color. As a condition of maintaining the action, the District Court required Pleasant Grove also to seek pre-clearance for the Glasgow Addition annexation, although Pleasant Grove represented that it would abandon that annexation rather than seek pre-clearance for it.

Pleasant Grove moved for summary judgment with respect to both annexations. It argued that since there were only white voters in Pleasant Grove and in the Glasgow Addition and no voters at all in the Western Addition, these annexations could have neither the purpose nor the effect of denying black persons the right to vote on account of race or color. The three-judge District Court, by a vote of two to one, denied the motion (App. B). It reasoned "(1) that in the context of annexation, the Voting Rights Act applies if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect and (2) that the failure to annex is a violation of the Act provided discriminatory purpose is shown" (App. 10b). The Court concluded that based on the record before it, a genuine issue of material fact was presented as to whether there had been a discriminatory purpose in Pleasant Grove's failure to annex Pleasant Grove Highlands. Judge George E. MacKinnon wrote in his dissent:

> . . . Since the annexations at issue do not *change* any existing minority voting rights and the Voting Rights Act only applies when there is some "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U.S. 130, 141 (1976), it is my view that the two annexations, one of which is inhabited by one non-minority family, cannot constitute a violation of the Voting Rights Act, regardless of the motives of the City. Accordingly, summary judgement is appropriate. [Emphasis in original text] [App. 14b–15b]

Thereafter, the case was submitted to the District Court on the record without trial. Pleasant Grove argued, based on the entire record, (1) that Pleasant Grove Highlands' petition was not treated less favorably procedurally than petitions from areas inhabited by white persons, (2) that Pleasant Grove's past practice had not been to annex areas which would be excluded from annexation on the rationale which denied annexation to Pleasant Grove Highlands, and (3) that the rationale advanced for denying annexation to Pleasant Grove Highlands was supported by the evidence. Pleasant Grove's past practice with respect to annexation had been to annex uninhabited or almost uninhabited land because it derived a substantial proportion of its revenues from land development. Although there had been annexations to Pleasant Grove, or parts of annexations, where there were motivations other than the economic advantage of development fees, no annexation had taken in an area considered as a whole with a development density greater than 0.1 structure per acre, which was the development density of the Glasgow Addition. Pleasant Grove Highlands, not including the Five Acre Road area which the Government conceded was not appropriate area for annexation, had a development

density greater than 1 structure per acre. Only land development fees made annexation economically advantageous, because, as the Government had conceded in the course of the proceedings, revenues which could be expected to rise in approximate proportion to population if the city were to annex Pleasant Grove Highlands would constitute only fourteen (14) to twenty-eight (28) percent of the city's expenditures depending on the year in which the calculation was made.

The District Court, again by a vote of two to one, ruled against Pleasant Grove. The court found (1) that the city had never conducted an economic study to determine the advantages and disadvantages of a particular annexation, (2) that Pleasant Grove's reliance on the determination of its "Annexation Committee," made during the course of litigation, that the annexation of Pleasant Grove Highlands was economically disadvantageous, was a sham, and (3) that substantively, Pleasant Grove's arguments concerning the cost of fire protection, street and sanitation, and police protection, and the loss of revenue from development fees if Pleasant Grove Highlands were annexed were unpersuasive. Finally, the trial court found that Pleasant Grove had adopted discriminatory policies with respect to matters other than annexation which suggested that discrimination motivated Pleasant Grove's annexation policy as well. Accordingly, the trial court denied pre-clearance. (App. 1a-12a)

The majority opinion did not address Pleasant Grove's principal contention. The failure of Pleasant Grove to conduct a formal economic study of the advantages or disadvantages of annexing Pleasant Grove Highlands could not be deemed significant where no

such study had been made for any other proposed annexation. Pleasant Grove had not either in making its annexation decision or in argument before the trial court relied on the activities of the Annexation Committee nor had Pleasant Grove relied on evidence that the annexation of Pleasant Grove Highlands would impose disproportionate demands on the fire department or the street and sanitation services (App. 23a). What Pleasant Grove did rely on was the loss of development fees, and to a much lesser extent a disproportionate burden on the police department.

Judge MacKinnon addressed these issues as follows:

> The record, however, is in truth largely inconclusive on the comparative per capita costs to Pleasant Grove of providing vital services to the respective areas in question. Only as to police services was there any indication that petitioners might be more expensive, and the crime data was incomplete. Nonetheless, there is one very good fiscal reason that Pleasant Grove should prefer annexation of the Western Addition to that of the petitioners—and indeed prefer annexing any undeveloped area to most inhabited developed neighborhoods. The following statement, based on deposition and exhibits, sums up the City's financial situation:
>
> *The City of Pleasant Grove derives most of its revenue, not from taxes or the other usual impositions of city governments, but from the sale of water and natural gas.* The City, through its Utilities Board, is the distributor of water

and natural gas *for the area of Alabama which surrounds it.* [Mays Affidavit, para. 3]. In the year ending September 30, 1980, Pleasant Grove's "Total revenues and transfers" were $1,382,193. [Exhibit C to Attachment 3 to the Mays Affidavit]. "Revenues" contributed only $449,341 of this amount. $882,852 came from "Transfers from other funds." Of that $882,852, $871,852 was transferred from the Utilities Board of the City of Pleasant Grove. . . . *"Revenues" provided only 28% of Pleasant Grove's expenditures* in the fiscal year ending September 30, 1980.

> [H]owever, not all items under "Revenues" could be expected to increase in approximate proportion to population if Pleasant Grove were to annex [petitioners]. . . . [T]he items of *revenue which would grow proportionately with annexation total only $255,404, which is only 14% of "Total expenditures and transfers"* for 1980. [Mays Affidavit, para. 4].

Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at 10-11 (emphasis added). According to the deposition of the City's clerk and treasurer, Sarah Mays, the updated figure for revenues that should increase proportionately to population is 23%. Mays Deposition at 12. The government nowhere contests the accuracy of these figures

as a basic outline of the municipality's finances.

> The City's heavy reliance on *profits* from the distribution of water and natural gas to the surrounding vicinity provides a powerful reason alone for aversion to annexation of already populated areas. Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services.* . . . [Emphasis in original text] [App. 23a-24a]

This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

I. The annexation of vacant land or land containing one white family by a municipality with no black voters does not deny any black voter the right to vote on account of race or color.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, prohibits a State or political subdivision subject to Section 4 of the Act, 42 U.S.C. §1973b,[1] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it (1) has obtained a declaratory judgment from the District Court of the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) has submitted the

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[1]The State of Alabama is subject to Section 4. 30 Fed. Reg. 9897 (August 6, 1965).

proposed change to the Attorney General and the Attorney General has not objected to it.

It is established that an annexation constitutes a change in a voting practice or procedure. *City of Richmond* v. *United States,* 422 U.S. 358 (1975); *Perkins* v. *Matthews,* 400 U.S. 379 (1971). As the test is set out in *City of Richmond, supra,* at 370-371, an annexation violates Section 5 if (1) it significantly reduces the proportion of voters of a particular race, and (2) the minority race has been denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community."

Because there were no black voters in Pleasant Grove at the time these annexation decisions were taken, only white voters in the Glasgow Addition, and no voters at all in the Western Addition, it is clear that these annexations neither reduced the proportion of black voters in Pleasant Grove nor denied black voters representation equivalent to their political strength in the enlarged community.

Because the proposed annexations could not conceivably have had the effect of denying blacks the right to vote on account of their race, there is no basis whatsoever for inferring that that was the purpose. A purpose of denying blacks the right to vote in Pleasant Grove would best be served not by annexation of additional land but by a policy of no growth, because the sale of any house in Pleasant Grove brings with it some chance that a black person will purchase it.[2]

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[2]During the pendency of this lawsuit a black family moved into Pleasant Grove.

II. Pleasant Grove's subsequent failure to annex Pleasant Grove Highlands does not invalidate the decisions regarding the Glasgow and Western Additions because the failure to annex Pleasant Grove Highlands was not a *change* in a voting practice or procedure.

The Justice Department objected to the Glasgow and Western Additions not because it found any fault in those annexations *per se,* but because Pleasant Grove failed to act favorably on the annexation submitted some two months later by Pleasant Grove Highlands and Five-Acre Road. The District Court held that because Pleasant Grove had not affirmatively shown that there was no discriminatory purpose in the failure to annex Pleasant Grove Highlands, the annexation of the Western Addition approved two months earlier by the City Council and the annexation of the Glasgow Addition approved ten years earlier would not be pre-cleared.

This was error.

The residents of Pleasant Grove Highlands have never voted in Pleasant Grove. That they do not now vote in Pleasant Grove is thus not a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Section 5 of the Voting Rights Act does not require pre-clearance for a failure to change a voting practice or procedure.

This feature of Section 5 was explicitly recognized by this Court in *Beer* v. *United States, supra,* a case in which the City of New Orleans sought pre-clearance for its reapportionment of the city's councilmanic districts. The District Court had denied pre-clearance upon consideration of how two (2) at-large seats on

the seven (7) member council had affected minority voting strength "in the context of all circumstances touching the right to vote in councilmanic elections," *Beer* v. *United States,* 374 F. Supp. 363, 400 (D.D.C. 1974), although elections for the two at-large seats had been conducted in that fashion since 1954 and were not changed by the proposed reapportionment. On appeal to this Court, however, the United States reversed the position it had taken in the trial court and agreed with appellants that the District Court was mistaken in rejecting New Orleans' proposal because it did not eliminate the two (2) at-large seats. This Court wrote:

> The appellants and the United States are correct in their interpretation of the statute in this regard.
>
> The language of §5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under §5]." U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, 347. The ordinance that adopted [the reapportionment plan] made no reference to the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in the charter would have required approval by the city's voters. The at-large seats, having existed without change since 1954, were not subject to review in this proceeding under §5. [*Beer*

> v. *United States,* 425 U.S. 130, at 138-139 (1976)]

If Pleasant Grove were to attempt to annex Pleasant Grove Highlands, the annexation would be subject to pre-clearance under Section 5. Instead of voting as a part of a significant minority in Jefferson County (where two (2) out of eight (8) State Senators in the County delegation were black in 1979), the blacks residing in Pleasant Grove Highlands would vote as an insignificant minority in a city where all councilmanic seats are elected at large. Such an annexation would fail both prongs of the test in *City of Richmond, supra.* It would significantly reduce the proportion of black voters in the place where they were voting, and, because of the at-large feature of Pleasant Grove's system, it would deny black voters representation reasonably equivalent to their political strength in the enlarged community.

If it seems anomalous that the Government should argue for such a result, that is because it is anomalous. But for this case, the Government has never objected to an annexation where the municipality requesting annexation had no black voters and the area annexed had no black voters [Defendant's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 4; App. 22a]. What the Government is attempting to do, we respectfully submit, is not to protect the voting rights of the black residents of Pleasant Grove Highlands, but to procure for those residents the economic benefits which automatically accrue if the area is annexed to Pleasant Grove at the expense of their rights to reasonably proportionate representation in voting. There is no doubt, as we show *infra,* that the residents of Pleasant Grove

Highlands would derive great economic benefits from being annexed to Pleasant Grove and that Pleasant Grove would suffer corresponding economic detriment, but that is not the end sought by the passage of the Voting Rights Act of 1965.

III. The conclusion that the annexation of Pleasant Grove Highlands to the City of Pleasant Grove would not be in the financial interest of the City is clearly correct.

In the statement of genuine issues attached to the Government's response to Pleasant Grove's Motion for Summary Judgment (para. 1), the Government stated that it "d[id] not contest" the following material facts asserted by Pleasant Grove not to be in issue:

> "Revenues" provided only 28% of Pleasant Grove's "Total expenditures and transfers" in the fiscal year ending September 30, 1980. Those "Revenues" which could be expected to increase in approximate proportion to population if Pleasant Grove were to annex West Smithfield Manor are approximately 14% of "Total expenditures and transfers." (Mays Affidavit, paras. 3-4, Attachments 2-3) [Plaintiff's statement of materials facts attached to Motion for Summary Judgment, Argument III][3]

It follows inexorably, that Pleasant Grove should not annex developed property. Even if it is true, as the Government asserted below, that Pleasant Grove Highlands would be no more an economic burden on

[3]The 14% figure varied somewhat from year to year. In the fiscal year ending September 30, 1983, the figure was 23%.

Pleasant Grove than are the white residential areas which are already in the city, that would not justify its annexation, since *ad valorem* taxes could only provide between 14% and 28% of additional expenses. Development fees constitute an important source of city income, and it is only those fees which make annexation economically advantageous. If Pleasant Grove should decide to bring seventy-nine (79) already built homes into the city by way of annexation of Pleasant Grove Highlands instead of building those homes within the city, the city would give up $45,820 in development fees from the 79 houses. $45,820 is thus what it costs Pleasant Grove to annex the developed area of Pleasant Grove Highlands rather than an area of similar size in the area of the Western Addition.

As Judge McKinnon wrote in dissent:

> Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services.* [Emphasis in original] [App. 24a]

IV. The Interests at Stake are Important.

Under the decision below, the Government can use the Voting Rights Act of 1965, not as this Court said in *Beer* v. *U.S., supra,* to prevent "retrogression in the position of racial minorities with respect to the effective exercise of their franchise," but rather as a general lever to force covered municipalities to support racial minorities in any way in which the Civil Rights Division of the Department of Justice finds appropriate. It is entirely clear, in the instant case, that if Pleasant Grove Highlands had been annexed

by Pleasant Grove, which elects its City Council at large, the votes from some 79 minority householders in a population of approximately 7,100 would have no significant effect on the city's elections. That is, the annexation of Pleasant Grove Highlands, the result which the Civil Rights Division seeks in this case, would have the effect of reducing minority voting rights in violation of Section 5 of the Voting Rights Act. Needless to say, Congress did not intend such a result when it passed the Voting Rights Act.

WHEREFORE, appellant respectfully submits that the questions presented are so substantial as to inquire plenary consideration.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FILED
October 25, 1985

OPINION

Before George E. MacKinnon, *Senior Circuit Judge,* Aubrey E. Robinson, Jr., and Harold H. Greene, *District Judges.*

HAROLD H. GREENE, District Judge. On October 9, 1980, the City of Pleasant Grove, a community in Jefferson County, Alabama, brought this action under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, seeking a declaration that the annexation by the city of the so-called "Western Addition" did not have the purpose or effect of denying or abridging the right to vote on account of race or color. In March 1982, plaintiff moved for sum-

mary judgment,[1] and on August 3, 1983, after a hearing, the Court denied plaintiff's motion. *City of Pleasant Grove v. United States,* 568 F. Supp. 1455 (D.D.C. 1983).

The Court's opinion on the motion and Judge MacKinnon's dissent focused on the question whether a community without black voters would be in violation of the Act by annexing areas inhabited by whites while refusing to annex similarly situated, contiguous areas inhabited by blacks. On that issue, the Court held that, in the context of annexation, a violation occurs upon a showing of discriminatory *purpose* alone, and that it was not significant in terms of the Voting Rights Act that, since there were no black voters in the City of Pleasant Grove, there could be no dilution of the voting rights of blacks and hence no discriminatory *effect.* The Court further decided that a political entity may not annex adjacent white areas while applying a wholly different standard to adjacent black areas and failing to annex them based upon that discriminatory standard. 568 F. Supp. at 1460.

That decision is, of course, the law of the case. *Fogel v. Chestnutt,* 668 F.2d 100, 108-09 (2d Cir. 1981); *Handi Investment Co. v. Mobil Oil Corp.,* 653 F.2d 391, 392 (9th Cir. 1981); *Major v. Benton,* 647 F.2d 110, 112 (10th Cir. 1981); *United States v. Fernandez,* 506 F.2d 1200, 1204 (2d Cir. 1974); *White v. Murtha,* 377 F.2d 428, 431-32 (5th Cir. 1967); *Schupak v. Califano,* 454 F. Supp. 105, 114 (E.D.N.Y. 1978). See generally 1B *Moore's Federal Practice* paragraphs 0.404[1], 0.404[4.-1].

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[1]The complaint initially sought declaratory relief only with respect to the annexation of the Western Addition, and on May 15, 1981, plaintiff filed a motion for summary judgment as to this single annexation. On October 7, 1981, the Court ordered plaintiff to amend its complaint to include a second annexation, accomplished in 1971, which had not been precleared with the Department of Justice—the so-called "Glasgow Addition." Plaintiff amended its complaint and then moved for partial summary judgment as to the Glasgow Addition, requesting a finding that its annexation, too, did not have the purpose or effect of denying or abriding the right to vote on account of race or color. That annexation is therefore likewise before us.

The action is now before the Court on the merits and, as the plaintiff, the City of Pleasant Grove has the burden of proof. *City of Rome v. United States,* 446 U.S. 156, 162, 183-87 (1980); *City of Richmond v. United States,* 422 U.S. 358, 362 (1975); *Georgia v. United States,* 411 U.S. 526, 538 (1973); *City of Port Arthur v. United States,* 517 F. Supp. 987, 1010-11 (D.D.C. 1981), *aff'd,* 459 U.S. 159 (1982); *Mississippi v. United States,* 490 F. Supp. 569, 581 (D.D.C. 1979), *aff'd,* 444 U.S. 1050 (1980); *City of Petersburg v. United States,* 354 F. Supp. 1021, 1027 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973).

It is in this procedural framework that the Court now considers the factual issues.

I

During its history, Pleasant Grove approved the following four annexation requests: a parcel of land to the southeast of the city (1945); land in the northern, southern, and western areas (1967); the Glasgow Addition (1971); and the Western Addition (1979).[2] None of these areas had any black residents. During the same period, the city rejected annexation petitions from the Woodward School (August, 1971),[3] the Pleasant Grove Highlands (April 18, 1979); and

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[2]In August of 1969, a committee from Sylvan Springs and the West Grove area (both inhabited by whites) requested Pleasant Grove to consider consolidation with the former and annexation of the latter. This petition for annexation was actively pursued and facilitated by Pleasant Grove, but the annexation was blocked by the United States Steel Corporation, which, as an intervening property owner, had the legal right to do so. This Opinion constitutes the findings of fact and conclusions of law required by Rule 52, Fed. R. Civ. P.

[3]The city refused to annex the site on which the "black" Woodward School was located in order to avoid federal court school desegregation orders.

the Dolomite area (October, 1979). Each of these areas has been identified as a "black" area.[4]

The annexations directly at issue in this proceeding are those of the Western Addition (Western), the Glasgow Addition (Glasgow), and the Pleasant Grove Highlands (Highlands). The basic rationale offered by Pleasant Grove in discharge of its burden of proof is that its decisions to annex the "white" Western[5] and Glasgow areas, but not the "black" Highlands, were based not on race but on the city's economic self-interest.

In support of that rationale, Pleasant Grove adduced evidence[6] tending to show that, when the residents of the Highlands requested annexation (some two months after the annexation of Western), the mayor of Pleasant Grove appointed a committee to investigate. That committee, it is said, reported to the City Council that annexation would not be financially advantageous, and a second committee later likewise concluded that annexation would be economically costly to the city.[7] The principal substantive contentions Pleasant Grove is making in support of these

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[4]Pleasant Grove also refused to annex the Kohler (1969) and Westminster (1977-78) parcels which were inhabited by whites, because such annexations might have a "mushroom effect" leading to subsequent annexations of adjacent black areas. Patrick Deposition of April 2, 1981 at 55-56, 102-104.

[5]While the Western Addition is undeveloped, its location and the City's plans indicate that it is likely to be developed for use by white persons only.

[6]The parties submitted to the Court their affidavits, depositions, answers to interrogatories, admissions, and exhibits, and they stipulated that the Court may render its decision on the merits based on that record without the need for the taking of additional evidence at a trial.

[7]The chairman of the second committee testified that he decided to take no action on the request because no one had approached the City since his election to the Council in October, 1980; the matter was already in litigation; and he did not want to make any decision which would expose him to a race discrimination suit. Mosley Deposition of January 11, 1984, Part I at 15, Part II at 23-24, Plaintiff's Brief at 9.

conclusions are (1) that by annexing the Highlands, it would give up approximately $59,000 in development fees,[8] and (2) that the Highlands, unlike the "white" areas which had recently been annexed, requires more than its per capita share of City revenues, particularly in the form of police, fire, and sanitation services. We find, based on the evidence, that these contentions are without merit, and that they are a mere pretext for race-biased annexation decisions.

II

First. Neither in connection with the Highlands' petition nor at any other time did Pleasant Grove conduct an economic study to determine the advantages and disadvantages of a particular annexation; all the economic conclusions reached in this regard were developed after the fact. The evidence clearly shows that the City did not assess the economic or other impacts of annexation prior to its decision not to annex the Highlands,[9] and that it likewise performed no such studies in connection with its decisions to annex the Western and the Glasgow areas.

Second. Pleasant Grove's reliance upon the determination of its so-called "Annexation Committee"—that annexation of the Highlands would be too costly—is unpersuasive for other reasons as well. Although the City asserts that the committee was established in March, 1981 to consider economic impacts, committee members have testified that they were not notified of their appointments

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[8]Plaintiff's Brief at 9. Sarah A. Mays, the City Clerk of the City of Pleasant Grove and the Secretary-Treasurer of the Utilities Board, stated that the City would give up $45,820 in development fees if it annexed the Highlands (which consists of 79 houses) instead of building those houses within the city. Mays Deposition of January 13, 1984 at 19 and Exhibit 14 thereto.

[9]Or intend its decisions not to annex the Dolomite, Kohler, and Westminster areas. See note 4, *supra*.

until one year later.[10] It is likewise established that, if the committee met at all, it did so only once and then only on an informal basis, and that it never gathered its own information, but what data it had were provided to it by the Mayor from various city department heads who had already prejudged the issue.[11] The committee never questioned these individuals regarding economic issues; it generated no documents; and it made no official report to the City Council. Based on these uncontroverted facts, it is difficult to escape the conclusion that reliance by the City on the committee's recommendation for its decision not to annex Pleasant Grove Highlands is a sham.[12]

Third. Substantively, the economic justification presented to the Court for the City's failure to annex the

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[10]The Annexation Committee was made up of James (or "Pete") Mosley, Clyde Morgan, and Joe Cooper. Mosley averred that he was notified of the formation of the Committee shortly before receiving the Mayor's letter with enclosures concerning the estimated costs of providing services to the Highlands, dated May 24, 1982. Mosley Deposition of January 11, 1984, at 10-11.

Morgan likewise stated that he was appointed to the committee at approximately the same time as the letter was sent. Morgan Deposition of January 11, 1984 at 7. And Cooper, the third alleged member of the Committee, has no recollection of ever being appointed or serving on the second committee. Cooper Deposition of January 11, 1984 at 7-8.

[11]In his letter to the Committee Chairman, the Mayor gave his opinion that "it is the general consensus of all concerned that the costs of annexing [the Highlands] would be prohibitive, based upon the projected revenues that would be derived from same." Letter to Mr. Pete Mosley, Chairman, from Mayor Donald r. Morrison dated May 24, 1982. Govt's Exhibit 1 to January 11, 1984 Mosley Deposition.

[12]Indeed, only one member of the Committee, Pete Mosley, reached a conclusion concerning the desirability of annexing the Highlands, and his decision was based largely, if not entirely, on the fact that the matter was in litigation. See January 11, 1984 Deposition of Mosley, Part I at 15, 18-20, Part II at 23-24.

Highlands is no more persuasive.[13] The factors that have been cited in that regard are fire protection, streets and sanitation, police protection, and revenues from development fees.

A. The Pleasant Grove fire chief has stated that the annexation of the Highlands would have generated the need for three additional firefighters/paramedics and one additional rescue truck, at considerable cost to the city. That projection was entirely without factual basis, for the city was already providing free fire, police, and paramedic services to the Highlands, area, and thus *no* additional monies would have been needed as a consequence of annexation. The fire chief's projection is dubious for another reason as well: the anticipated cost for serving the 79 homes in the Highlands was more than the estimated cost of serving the 700 projected homes in the Western addition although the former is more easily accessible than the latter.

B. Similar problems exist with respect to the City's findings concerning the respective costs of providing street and sanitation services to the Highlands as opposed to the Western Addition. Those responsible for calculating the costs of these services applied entirely different cost methods for the needs of the Highlands than they did for those of the Western Addition. If the same method of calculating costs are applied to both areas, the cost to the city would be, depending upon the formula used, either $20,000 for

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[13]In connection with the City's reliance on the economic disadvantages allegedly flowing from an annexation of the Highlands, it is interesting to note that the Glasgow annexation, which the City did effect, was an economic drawback to it because of its inaccessibility to city fire and police services. That area, in fact, was annexed solely because of the personal relationship between city officials and the Glasgows who were described as "fine people" whom the city residents "would be proud to have in Pleasant Grove." Deposition of Councilmember Clyde E. Morgan of December 17, 1981, at 15, 17-18. Needless to say (see Part III *infra*), there were no expressions of opinion from city officials that the black inhabitants of the Highlands were "fine people" whom the City "would be proud to have" as members of the community.

the Western Addition and zero for the Highlands,[14] or $81,900 for the Western Addition and $6,917.24 for the Highlands.[15] In short, under either method, the cost of providing street and sanitation services to Western far exceeds the cost of providing such services to the Highlands.

C. On the issue of police protection, the City's high cost estimates for the Highlands were based primarily upon the view expressed by the police chief, that the black residents of the Highlands were more "crime prone."[16] Actually, to the extent that the statistics support that assessment at all,[17] they are explained by the fact that the Highlands was a "new" neighborhood still lacking cohesion.[18] In any

[14]Plaintiff stated that, as a result of anticipated development in the Western Addition, it would have to hire two additional sanitation workers at a cost of $10,000 each per year. No such additional personnel would be needed to service the 79 homes in the Highlands, however, because the residents offered to continue their private garbage collection after annexation. Graham Deposition of April 7, 1981 at 13 and 34. In any event, the City Clerk testified that the Department staff is currently underutilized. Mays Deposition of January 13, 1984 at 44-45.

[15]These figures are based on the 1980 average cost of street and sanitation services per household of $87.56. George Parkin, Superintendent Streets and Sanitation Department, used this figure to calculate the cost of providing services to the Highlands. Government's Exhibit 1 to Mosley Deposition of January 11, 1984.

[16]Police Chief Robert L. Love deposition of January 12, 1984 at 18.

[17]Chief Love based his opinion on a comparison of the number of burglaries committed in the Highlands between July 20, 1978 and January 3, 1979 with the number of burglaries committed in the City of Pleasant Grove during 1980. The available data for theft during this same high-crime period, however, indicates that the Highlands had a lower incident of theft than did Pleasant Grove. Only one theft was reported in the Highlands (79 homes, .013 thefts per household) whereas 79 thefts were reported in Pleasant Grove (2,400 homes, .033 thefts per household). Plaintiff's Exhibit 1 to Waldon Deposition of January 12, 1984 and attachments.

[18]January 12, 1984 Deposition of Detective Sergeant Waldon at 14-15. Burglaries in the Highlands declined from 25 in 1978 to 16 in 1979, to 13 in 1980, and to 2 in the first nine months of 1981. Plaintiff's Exhibit 1 to Waldon Deposition and attachments.

event—as is true with respect to the provision of fire and paramedic service—the Pleasant Grove police department already responds to calls in the Highlands, and the annexation therefore should not generate any additional costs.[19]

D. As concerns finally the question of revenues from new development, Pleasant Grove relies primarily upon the fact that if the city brought in the 79 already-existing homes in the Highlands, as distinguished from having an equal number of new houses built within the city, it would lose $45,820 in development fees. That argument fails entirely to consider, however, that annexation of the Highlands would generate immediate ad valoram [sic] tax revenues for the city, and that the Highlands area contains sufficient undeveloped land to allow the construction of 80 new homes.

Pleasant Grove also estimated that the annexation of the Western Addition would generate anywhere from $768,250 to $1,424,500 in development fees over a four year period,[20] in the form of building permits, subcontractors' licenses, increased property taxes, and the like. These figures, however, are shown by the record to be highly inflated. For example, the City's estimated annual tax revenue for the new Western homes exceed those of the City's most expensive neighborhoods. Moreover, on economic grounds other than development fees, the annexa-

[19]No new police costs were projected for the Western Addition even though Chief Love testified that development of this area would also require new resources. Love deposition of January 13, 1984 at 9-10.

[20]Plaintiff's counsel stated in a letter of August 20, 1980 to the government that the City's total estimated revenue from development fees over the next four years would be $768,250. Government Exhibit 1 to Mosley Deposition of January 11, 1984. In a letter dated July 14, 1980 to plaintiff's counsel, the Mayor of Pleasant Grove estimated that the development fees and receipts expected from the annexed area for the next four year period would be $1,014,600. Government Exhibit 3 to Mosley Deposition. A month earlier, however, the Mayor had estimated that the City would receive $1,424,500 in development fees from the annexation of Western. Government Exhibit 2 to Mosley Deposition.

tion of the Western Addition appears to be more costly to the City than the annexation of the Highlands.[21]

We find that the economic justification advanced by Pleasant Grove for its annexation practices is flawed both procedurally and substantively, and that it is no more than a transparent attempt to put a valid gloss on decisions which plainly had a racial purpose.

III

In addition to the evidence of the disparate approach Pleasant Grove took with respect to almost every phase of its economic analysis of the proposed annexations, there is ample evidence before the Court that the City adopted racially-discriminatory policies with respect to matters other than annexation. As a matter of law, the Court may, and it does, infer on the basis of this evidence as well that racial bias was the purpose of Pleasant Grove's annexation policy.[22]

From the 1940s to the present, Pleasant Grove's housing and zoning policies have been designed to exclude blacks from the City. This was done either directly[23] or through

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[21]Thus, the overall projected cost of annexing Western fails to take into account such necessary construction as a new fire station, a major traffic artery, and a new neighborhood park.

Beyond that, even if it were to be assumed that Pleasant Grove would not fare as well with respect to the one item of development income by annexing the Highlands as by failing to do so, the City clearly did not know this when it rejected the Highlands petition.

[22]See *Rogers v. Lodge*, 458 U.S. 613, 624-26 (1982); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

[23]In the early 1940s, the Pleasant Grove City Council acted to prevent the construction of a "colored housing project" within the City, and it directed the City attorney to draft a zoning ordinance designed to "restrict colored property." See Minutes of Pleasant Grove Town Council Meeting of November 3, 1941. In fact, the Town Clerk was instructed to write Mr. Pill of the Woodward Iron Co., that the City sincerely desired that he would not sell any land within the corporate limits for a "colored housing project," and that it highly encouraged

its efforts to exclude apartment construction (in the belief that apartment housing was likely to be occupied by blacks).[24] Moreover, Pleasant Grove has managed to maintain an all-white residential community by operating a dual white-black housing market through a variety of devices, such as advertising and marketing directed exclusively to white buyers, and racial steering.[25]

Pleasant Grove has likewise made clear its policy of hostility to the presence of blacks in subjects other than housing. The City has never hired a black person, preferring to draw its employees from as far away as fifty miles rather than to hire blacks living in surrounding Jefferson County, which is one-third black. When a federal court in 1969 required the County to abandon its segregated school system,[26] Pleasant Grove voted to secede from the county school system on the evening of the very day the court's order was issued. The City established its own separate "white" school system, financing it with extraordinary taxes,[27] and funds diverted from the municipal utility sys-

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the project to be "built outside *so as to avoid conflict with our zoning ordinance.*" Exhibit 12 to Response of the United States to Plaintiff's Motion for Summary Judgment filed on March 26, 1982 (hereinafter Government's Response Brief) (emphasis in the original). In the Town Council meeting of November 1, 1943, the Town Clerk was instructed to contact the City attorney concerning a zoning ordinance to restrict "colored" property and business districts and white residential property within the corporate limits. Exhibit 13 to Government's Response Brief.

[24]See Milton C. Russell Deposition of April 3, 1981 at 22-24. See also Bobby R. Patrick Deposition of December 17, 1981 at 40. The City's restrictive zoning ordinance prohibiting the construction of apartments was struck down by a federal court on the ground that it had a racially-exclusionary effect. *Wheeler v. City of Pleasant Grove*, C.A. No. 78-F-1150-S (N.D. Ga. 1979).

[25]See Joe Nathan Dickson Deposition of April 17, 1981 at 8-14, 17-18, 27-29; Albert Mason Deposition of April 7, 1981 at 21-22, 26-27; Billy F. Graham Deposition of April 7, 1981 at 7-10.

[26]*Stout v. Jefferson County Board of Education*, C.A. No. 65-396 (N. D. Ala. 1969).

[27]In addition to enacting higher sales and other taxes, the City Council raised the ad valorem property tax rate to the highest level in Jefferson County.

tem.[28] These actions, and others,[29] demonstrate that the City of Pleasant Grove has attempted to exclude blacks from becoming residents of the City and all facets of City life, including voting in municipal elections, and that it has, in fact, succeeded in doing so. As the *Rogers* and *Busbee* cases, cited *supra*, hold, such actions are valid evidence of discriminatory purpose in a voting rights action.

The mass of evidence of a specific racially-biased annexation policy, supported by what must be, for this day and age, an astonishing hostility to the presence and the rights of black Americans, far overshadows and outweighs the City's feeble effort to portray its annexation policy as economically motivated. We find that the economic rationale advanced by Pleasant Grove is pretextual, and that the city has wholly failed to carry its burden of establishing that its annexation policy does not have the purpose of denying or abriding the right to vote on account of race or color.[30]

For these reasons, it is the judgment of this Court that the request of plaintiff for preclearance of the annexations of the Western and the Glasgow Additions pursuant to section 5 of the Voting Rights Act must and will be denied.

MacKINNON, *Senior Circuit Judge* (dissenting): The City of Pleasant Grove is a small municipal corporation in Alabama which is a suburb of the City of Birmingham. At

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[28]That separate school system was ultimately abolished in 1972, by another federal court order. *Stout v. Jefferson County Board of Education*, No. 72-1102, *aff'd*, 466 F.2d 1213 (5th Cir. 1972).

[29]Among other things, the Pleasant Grove City Council authorized the formation of a chapter of the White Citizens Councils, it thanked Governor George Wallace for his fight against desegregation, and it condemned the Birmingham Bar Association for its expression of moral support to Judge Samuel Pointer of the U.S. District Court for the Northern District of Alabama for his efforts in *Stout*.

[30]Even if the burden of proof were on the United States—which it is not—we would have had no difficulty in finding that the annexation policy of Pleasant Grove is, by design, racially-discriminatory in violation of the Voting Rights Act.

times here relevant it had a population of 7,086, all of whom were white citizens except for one Oriental and 32 blacks who live in two nursing homes and require 24 hour-a-day supervision. There are no black voters in Pleasant Grove. This case involves primarily the annexation of the Western Addition, a large tract of *completely vacant land* that is contiguous to the western boundary of the City. The 1969 annexation of the much smaller Glasgow Addition, inhabited only by the white citizens of the Glasgow family, is also involved in this case. Despite the absence of any affirmative duty under section 5 of the Voting Rights Act for an electoral district to improve the position of minority voters or to reduce the strength of a majority, my colleagues decide that these annexations violate the *Voting Rights Act* because the City Council did not *subsequently* annex an area south of the City that is *inhabited* completely by black citizens. The majority have thus in effect denied preclearance of the annexation of both the Western and Glasgow Additions. While Pleasant Grove has a history of past racially discriminatory conduct, in my opinion subject annexations do not violate the Voting Rights Act. Pleasant Grove, moreover, has clearly met its burden by showing an economic justification for the annexation of the Western Addition.

I.

The Western Addition is a tract of *completely vacant land* contiguous to the western boundary of Pleasant Grove. The City of Pleasant Grove owns 50 acres of the land and the Mead Corporation and Gary H. Dobbs, Sr. owns the remainder, estimated from the map at approximately 389 acres. In the latter part of 1978, these owners contacted the mayor of Pleasant Grove and requested annexation of the Western Addition to Pleasant Grove. The proposal came before the Municipal Council on February 5, 1979. On that date the Council adopted a resolution, four to one (abstention), annexing the Western Addition. Since the Western Addition was completely vacant land with no residents, and thus no person would be made a

:esident of Pleasant Grove without an opportunity to vote on the issue, the local state senator introduced legislation in the Alabama legislature to formalize the annexation. The bill was advertised in local newspapers in February and March 1979.[1]

Shortly thereafter, some residents of nearby West Smithfield Manor[2] ("Smithfield") filed a petition jointly with some citizens of the adjacent "Five Acre Road" area (collectively "petitioners") requesting annexation to Pleasant Grove. Petitioners' areas are inhabited completely by black citizens. The petitioners' request came before the Council on May 7, 1979, and was referred to a committee. The Smithfield petitioners explained that they sought annexation to Pleasant Grove because, according to the newspapers, Pleasant Grove was withdrawing their free fire protection. The continuation of paramedic services was also in doubt. At a meeting of the Pleasant Grove Council on June 18, 1979, however, the Council voted to continue providing free fire protection to Smithfield, and later paramedic services were also continued. The Council took no further action on petitioners' request for annexation.

The Attorney General denied preclearance for the annexation of the Western Addition because the predominantly black Smithfield and the Five Acre Road areas had not been annexed by Pleasant Grove. Pleasant Grove subsequently brought in this court an action under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982), seeking a declaratory judgment that the annexation of the vacant land in the Western Addition did "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."

Pleasant Grove later amended its complaint, pursuant to order of this court, to include the much smaller an-

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[1]The bill was signed by the Governor on July 17, 1979.

[2]The name of West Smithfield Manor was changed to Pleasant Grove Highlands after its petition for annexation was filed. There were approximately 80 black families in the Highlands. *See* Defendant's Statement of Genuine Issues at 3.

nexation 10 years before, in 1969, of the Glasgow Addition, which had not previously been approved. The Glasgow Addition is contiguous to Pleasant Grove on its northern boundary and, according to measurement of the map, comprises an area of slightly less than 40 acres. In 1969 the area contained four houses all belonging to the Glasgow family. Two houses have since been added. The population was 14 in 1969 and is currently 20; all are members of the Glasgow family, and are white. Otherwise the area is completely devoid of inhabitants.

Initially this court denied plaintiff's motion for summary judgment, *City of Pleasant Grove v. United States*, 568 F. Supp. 1455 (D.D.C. 1983), and the matter then came on for hearing on the merits. The majority today holds that the City's proposed annexation violates the Voting Rights Act. Although the City of Pleasant Grove has a history of racial discrimination in other respects, in my opinion, it cannot be said that the City has violated the Voting Rights Act by subject annexations. A violation of the Act requires a "den[ial] or abridg[ment] of voting rights on account of race or color." Incapable of finding any such effect, the majority finds a violation based on past racial discrimination in respects other than voting and on bare speculative future *illegal* discrimination in other respects that arguably would result in *speculative* dilution. As is demonstrated below, however, this conclusion is based on a number of assumptions that in truth are not supported by the record or by reason.

II.

As stated above, the annexed 430 acre Western Addition is completely uninhabited and the Glasgow Addition was practically *uninhabited.* Yet the majority opinion makes numerous references to the Western and Glasgow Additions as being "*inhabited by whites.*"[3] There is not a single

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[3]In footnote 5 my colleagues state "while the Western Addition is undeveloped, its location and the city's plans indicate that it is *likely* to be developed for use by white persons only" (emphasis added). Never-

person, however, white or black, living in the large 430 acre area covered by the Western Addition, and the much smaller Glasgow Addition includes members of one family only—the Glasgows. But this mischaracterization of the facts is necessary to support the fallacious theory of my colleagues that these areas should be treated as being inhabited *solely* by white citizens because Pleasant Grove, through the years, has managed to remain all white in part by following racially discriminatory practices. The majority therefore treats the annexation of vacant land exactly as if that land were already inhabited exclusively by whites. The majority thus treats its speculation as to the future development of the Western Addition to Pleasant Grove as a fact upon which a Voting Rights Act violation can be predicated.[4]

The majority is apparently persuaded by the government's assertion that the uninhabited areas should be treated as "white" areas. The weakness in the government's evidence, however, is apparent in its response to the plaintiff's first set of interrogatories, which indicates

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theless, my colleagues continue to state that the annexations are *white areas*. They reason illogically that if it is *likely* to be developed it *must* be treated as a white area. The majority assumes that the City will lawlessly participate in the segregated development of the Western Addition. While I recognize that the City has acted previously in a racially discriminatory fashion, I am unwilling to fully join the majority's assumption as to the City's future conduct. Moreover, if the City does discriminate on the basis of race or color in developing the Western Addition, federal redress would be available by an action under the Fourteenth Amendment or the more appropriate Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1982). However, since the majority's fears are based on historical practices, I would issue an injunction under the Voting Rights Act. *See* discussion *infra*.

[4]It must be kept in mind that the City's refusal to approve the annexation requests of the Smithfield, Five Acre Road, and Dolomite areas is not at issue in this action. On the authority of *Beer v. United States*, 425 U.S. 130 (1976), it is clear that section 5 of the Voting Rights Act does not apply to the refusal to alter electoral procedures. Thus the City's failure to annex these areas is not properly before the court, although the majority seems unaware of this point. *See* Maj. Op. at 4.

that the government refused to approve the annexation of the Western Addition and Glasgow areas because "said land was annexed for the express purpose of residential construction, *which houses will be occupied by white persons.*" As indicated above, the italicized statement is completely speculative. The government points to the fact that the other annexations have generally developed with completely white populations. However, there is absolutely no way to guarantee, much less safely predict, that newly annexed areas will be occupied exclusively by white citizens or by black citizens. Even if the annexed areas become generally white, this will not necessary [sic] be the result of illegal discrimination. The majority, however, writes as if the City has an affirmative duty to pursue an annexation policy which will result in a higher proportion of voting blacks within the City. But the existence of such a duty has been explicitly denied by the Supreme Court in its interpretation of the Voting Rights Act. *See* discussion *infra*. Whenever land in the Western Addition is available for purchase, there is always the possibility that it will be bought by a black citizen.

My colleagues further state:

> The Court [meaning the majority opinion on the motion] further decided that a political entity may not annex *adjacent white areas* while applying a wholly different standard to adjacent black areas and failing to annex them based upon that discriminatory standard. 568 F. Supp. at 1460.

Maj. Op. at—. They contend that this statement from the prior majority decision states the law of the case. But it is *not* the law of the case because it is based on facts that are *not* the facts of this case. The true facts here bring into play *uninhabited* and black inhabited areas—not white and black *inhabited* areas.[5]

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[5]The 40 acre Glasgow Addition differs from the Western Addition insofar as it was inhabited by 14 white citizens at the time of annexation, in contrast to the 430 acres of completely vacant land in the

My colleagues spell out numerous racially discriminatory practices by Pleasant Grove over the last 45 years. These practices include racial discrimination in zoning and hiring, racial steering in the housing market, school segregation and discriminatory annexation. While some are overstated and recognize no adverse or ameliorative explanation, the allegations of substantial historical racial discrimination are generally accurate. The majority has some reason to conclude that Pleasant Grove has successfully excluded black citizens from becoming residents and from practically *all* facets of its local life. The court, relying upon *Rogers v. Lodge,* 458 U.S. 613, 624-26 (1982) (discrimination in at-large voting), and *Busbee v. Smith,* 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983) (reapportionment of congressional districts splitting composite black areas to minimize possibility of electing a black candidate), however, goes further and concludes that such historic discrimination in other respects validly evidences the discriminatory *purpose* required under the Voting Rights Act to justify denying preclearance of annexations. This last step is unwarranted and misconstrues the law of discriminatory purpose.

The discriminatory "*purpose*" which is required by decisions in the voting rights cases is a purpose *related to*

Western Addition. However, the fact remains that the Glasgow Addition is a forty-acre parcel populated by members of a single extended family, albeit a white family. In addition, the record shows that annexation of the Glasgow Addition was approved as a personal favor to the Glasgow family, a reason not foreign to the action of city councils in small towns. While the majority may look askance at municipal decisions based on such factors, I am unprepared to say that the Glasgow decision was made for the "purpose or will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1982). Such effect is in no way demonstrated. Even if the presence of the Glasgow family were to cause a different result, the annexation of the Western Addition should still be approved. Since the Western Addition poses the primary problem here, this opinion is generally directed at the issue raised by its annexation.

voting.[6] No such relation exists here. *Rogers,* relied on by the majority, involved the maintenance of an at-large system of electing county commissioners that was neutral in origin, but which was being maintained for discriminatory purposes. *Rogers,* 458 U.S. at 626-27. It did not in any way involve the speculation that some act, such as annexation, would eventually result in the denial or abridgement of minority voting strength. *Busbee,* on which the majority also relies, emphasized that discriminatory purpose alone would taint a *voting change.* But *Busbee* involved an actual voting change—the reapportionment of congressional districts involving actual voters. In this case, since the land is vacant, there is no voting change. If there is no concrete voting change at issue, there can be no "*voting change*" taken with a purpose of discriminating, *see Busbee,* 549 F. Supp. at 516 (emphasis added), and thus no violation of the Voting Rights Act, even one based on "purpose" alone.

In its denial of the City's motion for summary judgment, the majority virtually conceded that because of the peculiar facts of Pleasant Grove—the complete absence of blacks in the City and the annexed areas—the annexations could not conceivably have any discriminatory *effect. See City of*

[6]The statute itself indicates that a discriminatory purpose must be related in some way to voting: "Whenever a [jurisdiction covered by the Voting Rights Act] shall enact or seek to administer any voting qualification or prerequisite to voting . . . such [jurisdiction] may institute an action . . . for a declaratory judgment that such qualification [etc.] does not have the purpose . . . of denying or abridging the right to vote on account of race or color . . . ." 42 U.S.C. § 1973c (1982). The Supreme Court's decision in City of Richmond v. United States,422 U.S. 358 (1975), which held that annexation decisions may in some instances be subject to review under the preclearance procedures of section 5, is not to the contrary. In *Richmond* the proposed annexation had a direct and substantial bearing on the electoral position of the city's black voters, whereas the proposed annexation in this case will not affect the position of minority voters, either by dilution or exclusion. To include all annexation decisions within the Voting Rights Act would not only hamper municipal decisionmaking, but would detract from the Act's central purpose of assuring that minority voters are free to exercise their constitutionally protected suffrage rights.

Pleasant Grove v. United States, 568 F. Supp. 1455, 1458 (D.D.C. 1983). It defies all reason and common sense to attribute to a governmental entity the purpose to achieve something that cannot conceivably be achieved, particularly when it is so obviously impossible that the voting rights of any black citizen could be adversely affected. Under the majority's approach, the statutory concept of "purpose" is stretched entirely out of proportion, to the point of becoming a mere legal fiction: where a municipality had a history of racial discrimination, the majority seems to say that "purpose" to impair the voting rights of blacks can be *presumed* by an annexation of completely vacant land.

In my view the plaintiffs have demonstrated that the annexations do not "have the purpose and will not have the effect of denying or abridging *the right to vote* on account of race or color. . . ." Section 5 *supra* (emphasis added). Annexations pose problems slightly different than the ordinary Voting Rights Act case. *See Perkins v. Matthews,* 400 U.S. 379 (1971); *City of Petersburg v. United States,* 354 F. Supp. 1020 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973); *City of Richmond v. United States,* 422 U.S. 358 (1975).

In *City of Petersburg* we were confronted with a substantial dilution of the voting strength of black citizens. Petersburg covered an eight square mile area with a population of 36,103, and it annexed fourteen square miles of adjacent area containing 7,323 persons. Before the annexation Petersburg was 55% black and 45% white; after the annexation Petersburg was 54% white and 46% black. This represented an almost complete reversal in racial proportion—a substantial dilution. We approved the annexation on the grounds that it was conducive to the orderly development of Petersburg but, in order to ameliorate the substantial dilution of the black vote, we *imposed the condition* that Petersburg switch from an at-large to a ward system of electing the members of the council. The Supreme Court affirmed, 410 U.S. 962, and in *City of Richmond* stated that "*Petersburg* was correctly decided." 422 U.S. at 370.

City of Richmond was followed by *Beer v. United States,* 425 U.S. 130 (1976), which held that "the purpose of § 5 has always been to ensure that no voting-procedure *changes* would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. *City of Lockhart v. United States,* 460 U.S. 125 (1983), another Voting Rights Act case from a three-judge court of this district, followed. In *Lockhart,* Chief Judge Spottswood Robinson stated in dissent that "the voting strength of Lockhart's minorities, whether or not enhanced, [has not been] diminished one whit." 559 F. Supp. 581, 595 (D.D.C. 1981). In siding with the dissent, the Supreme Court found that "[t]he District Court erred in finding that the continued use of numbered posts has a retrogressive effect on minority voting strength." 460 U.S. at 135. The Court also stated that while "there may have been no improvement in [the] voting strength [of minorities] there has been *no retrogression* either," and therefore "[a]pplying the standards of *Beer v. United States*" the Court ruled that "the election changes introduced by the 1973 Lockhart City Charter will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." *Id.* at 135-36. The result of the annexations here is practically identical—the annexation of the Western Addition and the Glasgow Addition will not deny or abridge the *right* to vote on account of race or color of a single individual.

As stated above, however, the majority contends that the annexations in this case constitute a violation of the Voting Rights Act because Pleasant Grove cannot escape its history of numerous acts of racial discrimination extending all the way back to 1940 and beyond. In my view this conclusion is based on highly speculative reasoning and assumptions. Moreover, in my opinion, there is no violation of the *Voting* Rights Act here, since there is no showing of any *retrogression* in any respect in the Voting Rights of any minority by the speculative conclusion that such discrmination is "likely" to arise in the future. My

colleagues are indulging in an unreasonable expansion of the Voting Rights Act. This is the first case I can find and none have been called to our attention where objection is raised to annexation of an uninhabited area by a municipality with no black voters. I would therefore approve the annexations, and to alleviate the speculative fears stemming from the historic racial discrimination, I would, as a condition to approving the annexations, enjoin the City of Pleasant Grove from taking any action affecting the Western and Glasgow Additions that would constitute any form of racial discrimination.[7]

It may be in the years ahead that the development of the Western Addition will turn out like the rest of Pleasant Grove and become exclusively or substantially occupied by white citizens. This could be accomplished by completely normal and legal activity. However, if black citizens want to move into the area, they have a constitutionally protected right to do so. If Pleasant Grove takes any discriminatory action based on race or color, it could be redressed under the injunction.

III.

Not only is the government's contention that the Western Addition assuredly will develop all white occupancy essentially speculative, but both annexations may also be justified in terms of the City's fiscal structure. The City points out that *uninhabited* land is open to development, and once developed will create a new market for municipal water and gas, thus producing substantial municipal income. On the other hand, the areas that the majority faults Pleasant Grove for not annexing are substantially *inhabited,* and are thus void prospects for producing potential municipal income from its most beneficial source. Revenue from taxes would merely be a standoff for services rendered.

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[7] I also rely on my opinion in City of Pleasant Grove v. United States,568 F. Supp. at 1460-64 (1983).

The majority's decision focuses on, *inter alia,* the economics of the various annexation decisions. The government pointed out that the City's decisions not to annex petitioners and Dolomite (another area inhabited by black citizens) were not preceded by any comprehensive study, and argues that some of the figures subsequently produced by City officials distort the true comparative picture of costs and benefits to Pleasant Grove of annexing the black citizens' areas, as opposed to the Western Addition. The majority largely follows the government in this approach. The City does not contest the absence of any formal economic analysis prior to its annexation decisions, and now concedes that some of the cost figures (those for the fire department and for streets and sanitation) were inaccurate. Plaintiff's Reply Brief at 10.

The record, however, is in truth largely inconclusive on the comparative per capita costs to Pleasant Grove of providing vital services to the respective areas in question. Only as to police services was there any indication that petitioners might be more expensive, and the crime data was incomplete. Nonetheless, there is one very good fiscal reason that Pleasant Grove should prefer annexation of the Western Addition to that of the petitioners—and indeed prefer annexing any undeveloped area to most inhabited developed neighborhoods. The following statement, based on deposition and exhibits, sums up the City's financial situation:

> *The City of Pleasant Grove derives most of its revenue, not from taxes or the other usual impositions of city governments, but from the sale of water and natural gas.* The City, through its Utilities Board, is the distributor of water and natural gas *for the area of Alabama which surrounds it.*[Mays Affidavit, para. 3]. In the year ending September 30, 1980, Pleasant Grove's "Total revenues and transfers" were $1,382,193. [Exhibit C to Attachment 3 to the Mays Affidavit]. "Revenues" contributed only $499,341 of this amount. $882,852 came from "Transfers from

> other funds." Of that $882,852, $871,852 was transferred from the Utilities Board of the City of Pleasant Grove. . . . *"Revenues" provided only 28% of Pleasant Grove's expenditures* in the fiscal year ending September 30, 1980.
>
> [H]owever, not all items under "Revenues" could be expected to increase in approximate proportion to population if Pleasant Grove were to annex [petitioners]. . . . [T]he items of *revenue which would grow proportionately with annexation total only $255,404, which is only 14% of "Total expenditures and transfers"* for 1980. [Mays Affidavit, para. 4].

Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at 10-11 (emphasis added). According to the deposition of the City's clerk and treasurer, Sarah Mays, the updated figure for revenues that should increase proportionately to population is 23%. Mays Deposition at 12. The government nowhere contests the accuracy of these figures as a basic outline of the municipality's finances.

The City's heavy reliance on *profits* from the distribution of water and natural gas to the surrounding vicinity provides a powerful reason alone for aversion to annexation of already populated areas. Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services.* In effect, the City would be subsidizing such an inhabited area—sharing the profit generated from water and gas distribution sold to new markets in newly annexed areas to pay for the services required in the already developed areas. Undeveloped areas, by contrast, may be expected to pay for the services they require by generating development fees, rather than tapping into the profits the City gains by selling gas and water. The exact levels of costs for services are entirely immaterial in this respect. This ability of Pleasant Grove to raise net revenue from the sale of water and gas alone provides a complete and presumably legitimate explanation for the failure of Pleasant Grove to annex substantially developed areas of

petitioners and Dolomite, and for preferring to annex the completely undeveloped Western Addition and the practically undeveloped Glasgow Addition.

The only areas which could sensibly be annexed are those which remain undeveloped—*i.e.*, still capable of yielding substantial *development fees* (for building permits). According to the affidavit of Mays and exhibits thereto, the City also relies to some significant degree on development fees as a source of revenue. Mays Affidavit, ¶5. In good years, the City's receipts of development fees equal or exceed the total of revenues derived from such sources as sales, income, and property taxes. This suggests that the majority is incorrect in suggesting that if the sales, income, and property taxes of the petitioners' areas were taken into account, it would be fiscally desirable to annex them. *See* Maj. Op. at 11. If the development of the Western Addition would produce a major potential source of such development fees, the City is thoroughly justified in desiring to annex the area which has that potential. The financial potential of the 1979 annexation is clearly distinguishable from the other situations, and constitutes a persuasive nonracial basis for the City's decision to prefer annexation of the Western Addition.

The majority attempts to undercut the figures submitted by Pleasant Grove, pointing out that no *prior* studies were made. That, however, does not sully the *present* figures. Moreover, Pleasant Grove is a small town of slightly over 7,000 persons, and councilmen in such municipalities are traditionally close to the costs and benefits of a small municipal operation. They may not need the extensive studies of larger cities nor should this court require them. It is just plain common sense that Pleasant Grove would profit more from developing areas where they will have a new market for a *profitable* activity than from annexing areas that are already serviced.

The existence of these persuasive, non-racial purposes for the annexations of the Western and Glasgow Additions negates the inference based solely on speculative assump-

tions from historic discrimination policies. This is especially true in this case, where the finding of a racial purpose by the majority is little more than a presumption of discriminatory purpose inferred from the City's history of racial discrimination. Historic racial discrimination can be a strong indication of discriminatory purpose, *City of Richmond v. United States*, 422 U.S. 358, 362 (1975), in cases where voting rights of actual resident citizens are involved, but this annexation of *vacant* land is not connected to voting and does not deny or abridge the right to vote on account of race or color. For these reasons, I cannot join the majority in their conclusion that the evidence proves that the annexations were arranged to advance a discriminatory purpose that is violative of the Voting Rights Act. On the contrary, the City has provided adequate fiscal reasons for its annexation of the Western and Glasgow Additions, and enjoining the municipality from any racially discriminatory action in the annexed areas will ensure that voting rights, and other civil rights, are not denied in contravention of the Constitution and statutes of the United States.

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED
August 3, 1983

MEMORANDUM ORDER

Before George E. MacKinnon, *Senior Circuit Judge*, Aubrey E. Robinson, Jr., and Harold H. Greene, *District Judges*.

H. GREENE, *District Judge*: The City of Pleasant Grove, a residential community in Jefferson County, Alabama, brought this action under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, seeking a declaratory judgment that the annexation by the city of certain land[1] did not have "the purpose or effect of denying or abridging the right to vote on account of race or color."

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[1]The complaint initially sought relief only with respect to an area referred to herein as the Western Addition. On October 16, 1982, the Court ordered plaintiff to amend its complaint to include a second annexation, that involving the Glasgow Addition (see *City of Rome* v. *United States*, 472 F. Supp. 221, 247 (D.D.C. 1979)) and plaintiff has so amended. The Glasgow annexation was accomplished by a city ordinance on May 3, 1971; the Western Addition was annexed by a 1979 Act of the Alabama legislature.

The Attorney General denied preclearance for the annexations because contiguous areas inhabited by blacks which had petitioned for annexation were not annexed by Pleasant Grove.

Presently before the Court is plaintiff's motion for summary judgment.[2] Plaintiff argues (1) that there is no evidence that the annexations were the product of a purpose to abridge the right of blacks to vote or had such an effect, and (2) that even if a purpose to discriminate could be established, it alone would not sustain the refusal of the Attorney General to clear the annexations.

I

Pleasant Grove has a population of 7,086 people, all of them white.[3] Jefferson County as a whole has 671,197 residents, one-third of them black. Other municipalities in west central Jefferson County have substantial black populations,[4] and there are several unincorporated black communities directly to the south and southeast of Pleasant Grove. Pleasant Grove may thus accurately be described as an all-white enclave in an otherwise racially mixed area of Alabama.

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[2]Plaintiff has moved for summary judgment with respect to the Western Addition and for partial summary judgment with respect to the Glasgow Addition, requesting a finding that annexation of these territories did not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The government has not asked for judgment at this time, although its counsel stated at oral argument that it would be prepared to stipulate that the affidavits and other exhibits filed by the two parties constitute the full trial record. Plaintiff has not taken a position on this suggestion.

[3]Thirty-two of the inhabitants are black, but they all live in a nursing home; they do not vote; and their residence in the city was apparently unknown even to the city officials at the time of the latest annexation. Because of the peculiar status of these 32 blacks, both parties have treated the City of Pleasant Grove as being all-white, and so will the Court.

[4]Birmingham's population is over 55 percent black, Bessemer 51 percent, Hueytown 9.6 percent, and Fairfield 52 percent black.

The basic issue here is whether the Voting Rights Act forbids the annexation by Pleasant Grove of areas inhabited or likely to be hereafter inhabited by whites at a time when Pleasant Grove is refusing to annex contiguous areas which are inhabited by blacks. Resolution of this issue demands examination of two subsidiary questions—first, can an intent to discriminate be attributed to Pleasant Grove on the present record, and second, assuming that such an intent exists, is Pleasant Grove prohibited from proceeding with its annexations in the absence of any allegation by the government that the voting power of blacks will be impaired or diluted?

II

The government's evidence, which, for purposes of the motions must be regarded as true,[5] shows an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life.

As early as in the 1940s, the Pleasant Grove city council acted to prevent the construction of a "colored housing project" within the city and directed the city attorney to draft a zoning ordinance designed to "restrict colored property." The city has thereafter consistently maintained a dual housing market through advertising and marketing directed exclusively to white buyers. In 1978, the city council adopted an exclusionary zoning ordinance which was found by a federal court to have a racially restrictive effect.[6]

Pleasant Grove's annexation policy followed a similar pattern. For example, the city refused to annex the site on which the "black" Woodard School was located in an attempt to avoid school desegregation orders issued by a

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[5]The government has submitted affidavits, exerpts from depositions, answers to interrogatories, and the like, to attest to all the facts alleged in its briefs.

[6]*Wheeler* v. *City of Pleasant Grove*, C.A. No. 78-G-1150-S (N.D. Ala. 1979).

federal court. See p. 5 *infra*. However, shortly after that refusal, the city annexed the Glasgow Addition which is located several miles outside the city limits past a black neighborhood which was not annexed. The city also declined at various times to annex two parcels of land[7] because of their location adjacent to black areas and the possibility that these areas might, in turn, press for annexation. In 1979, Pleasant Grove began its effort to annex the Western Addition which, together with the Glasgow Addition, is now directly before the Court in this action.[8] While the Western Addition annexation was taking its course, two black areas (Pleasant Grove Highlands and the Dolomite area) petitioned for annexation. Both were rejected.[9]

Pleasant Grove's discriminatory policies have not been confined to housing, annexations, and zoning.[10]

Prior to 1969, Pleasant Grove maintained a rigidly segregated school system: black children living in close proximity to Pleasant Grove were bused elsewhere. When a federal court mandated an end to this system on August 4, 1969,[11] the city council voted to secede from the county

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[7]Known as the Kohler and the Westminster areas.

[8]While the Western Addition is undeveloped, its location and the city's plans indicate that it is likely to be developed for use by white persons only.

[9]There is a dispute between the parties as to the relative economic benefits and detriments to Pleasant Grove as between the white areas and the black areas. These disputes cannot be resolved on a motion for summary judgment. Suffice it to say that, on the record as it presently stands, there are at a minimum genuine issues of material fact on these matters. The burden of proof is, of course, on Pleasant Grove. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia* v. *United States*, 441 U.S. 526, 538 (1973).

[10]Evidence of discrimination with respect to matters other than annexation or voting is relevant on the issue of purpose in Voting Rights Act cases. *Rogers* v. *Lodge*, 73 L. ed. 1012, 1021, 1023 (1982); *Busbee* v. *Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982) (three-judge court).

[11]*Stout* v. *Jefferson County Board of Education*, C.A. No. 65-396 (N.D. Ala. 1969).

school system on the very evening of the day the court order was issued.[12] Moreover, although the County is one-third black, Pleasant Grove itself has never had a black employee.[13]

From all these facts, a court could appropriately draw the inference that the City of Pleasant Grove had and has the purpose to discriminate against blacks with respect to voting as with respect to other subjects. To be sure, the incidents of discrimination do not directly involve voting, nor could they, since there were and are no blacks eligible to vote in Pleasant Grove: all blacks have simply been kept out. Nevertheless, as the Supreme Court has said, the "historical background of [a] decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). For that reason, proof of discrimination in a variety of fields may be used as proof in an action charging discrimination in voting. See note 10 *supra*.

The present record, if unrebutted, would warrant a finding that the City of Pleasant Grove had the purpose, in its annexation decisions, of "denying or abridging the right to vote on account of race. . . ." 42 U.S.C. § 1973c. The next question to be determined is whether such a finding

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[12]In subsequent litigation, the Court of Appeals for the Fifth Circuit held that the Pleasant Grove school system was not to be recognized if it has the effect of thwarting the implementation of a unitary school system. *Stout* v. *Jefferson County Board of Education*, 448 F.2d 403 (5th Cir. 1971). When, on remand, the District Court required Pleasant Grove to provide transportation to the black children assigned to its schools, the mayor announced, with the approval of the city council, that Pleasant Grove would not do so. Ultimately, the court abolished the Pleasant Grove school system and transferred control of the schools back to Jefferson County. *Stout* v. *Jefferson County Board of Education*, 466 F.2d 1213 (5th Cir. 1972), *cert. denied*, 411 U.S. 930 (1973).

[13]It may also be noted that the city council has authorized the formation of a chapter of the White Citizens Council; thanked Governor George Wallace for his fight against integration; and condemned the Birmingham Bar Association for its expression of moral support to District Judge Pointer for his efforts in *Stout*.

would entitle the United States to judgment in its favor after a trial and, thus, would defeat plaintiff's motions for summary judgment.

III

Pleasant Grove contends most vigorously that, especially in an annexation case, proof of a discriminatory purpose is insufficient; that there must be proof of a discriminatory effect. It further reasons that, since there are no black voters (or persons even arguably eligible to vote) in the city, there could be no proof of a discriminatory effect, and the government's claims must therefore be rejected.

The basis for these arguments is as follows. While according to *City of Richmond* v. *United States*, 422 U.S. 358 (1975), annexation constitutes a change in a voting practice or procedure, under that decision an annexation violates the Voting Rights Act if it reduces the proportion of voters of a particular race in the affected locality (or if the minority race has been denied the opportunity to obtain representation reasonably equivalent to its political strength in the enlarged community). It follows, according to plaintiff, that since there are no blacks eligible to vote in Pleasant Grove, the government cannot meet the *City of Richmond* standard. This conclusion is said to be buttressed by *Beer* v. *United States*, 425 U.S. 130 (1976) which held that the Voting Rights Act does not require preclearance for a *failure* to change a voting practice or procedure (as distinguished from an *active alteration* of such a practice or procedure). Again, since, with regard to the black areas at issue here, Pleasant Grove has simply failed to annex them, the *Beer* decision, so the reasoning goes, constitutes a complete defense.

This argument is not persuasive. The *City of Richmond* case and other, similar annexation decisions discuss the applicable standard in terms of the effect of the annexation on black voters in the annexing community because in those cases there happened to be black voters in that community and hence the annexations did have the effect

of reducing their voting power. These cases do not discuss, and hence they do not reject, the application of a purpose test, particularly not in the context of an annexation where, as here, there are no black voters in the annexing municipality.

However, a number of recent decisions make it clear that a discriminatory effect (on blacks already living in a community) is not the only yardstick by which discrimination in violation of the Voting Rights Act may be measured, and that annexation decisions made with a discriminatory purpose—regardless of effect—also constitute violations of the Fifteenth Amendment and the Voting Rights Act.

In *City of Port Arthur, Texas* v. *United States*, 103 S.Ct. 530, 535 (Dec. 13, 1982), the Court held that

> . . . even if [a particular] electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid *if adopted for racially-discriminatory purposes* . . . (emphasis added).[14]

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[14]The dissent charges us with misstating the Supreme Court's ruling in that case by failing to quote an entire paragraph from the opinion. That complaint would have validity if Judge MacKinnon were correct in his assumption that the Supreme Court meant to limit its condemnation of discriminatory purposes to situations where existing minority voting rights were being diluted (as distinguished from those where such an effect does not, indeed cannot, exist because blacks are completely denied the right to vote by being kept out of the particular voting area). But that assumption is clearly not correct, for it does not account for the Supreme Court's explicit reference to discriminatory purpose both in *City of Port Arthur* and in *Lockhart* (where under Judge MacKinnon's view reliance on discriminatory effect would have sufficed) or to the equally explicit reference in *Perkins* v. *Matthews* to revisions in municipal boundaries which keep blacks out. Viewed in that light, the portion of the *City of Port Arthur* opinion quoted by our dissenting colleague is nothing more than one illustration of the general rule that changes in voting practices which have a discriminatory purpose violate the Voting Rights Act, and it is therefore irrelevant to our holding.

The recent case of *Lockhart* v. *United States*, 103 S.Ct. 998, decided February 23, 1983, further supports this conclusion. The Court there referred with approval to the district court's recognition "that the City must prove both the absence of discriminatory effect and discriminatory purpose . . .," *id.* at 1001, and that "[i]n view of its decision on discriminatory effect, it was unnecessary for the District Court to reach the issue of discriminatory purpose."[15] *Id.* at n.4.

Indeed, the Supreme Court has described as discriminatory the very fact situation presented by this case. In *Perkins* v. *Matthews*, 400 U.S. 379, 388 (1971), the Court said,

> Clearly, revision of boundary lines has an effect on voting in two ways: (1) *by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not*; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation. . . . (emphasis added).

The second category mentioned by the *Perkins* court is that involved in *City of Richmond, supra*, and similar cases; the first category is that presented by this case. See also, *Busbee* v. *Smith, supra*, 549 F. Supp. at 515-16; and *Allen* v. *State Board of Elections*, 393 U.S. 544, 567-68 (1969).

The remark of the Fifth Circuit in *United States* v. *Hinds Country School Board*, 417 F.2d 852, 858 (5th Cir. 1969) that "nothing is as emphatic as zero" is particularly apt here. It would be incongruous if the City of Pleasant Grove, having succeeded in keeping all blacks out, could now successfully defend on the ground that there are no blacks in the city whose right to vote would be diluted by

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[15]To be sure, the Supreme Court there held that the "effect" prong of the Act is not violated by changes in voting laws which are not retrogressive in effect. That holding, of course, is irrelevant to the "purpose" prong.

the annexation of white, but not black, subdivisions. This Court is not prepared to endorse such an anomalous result.[16]

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[16]Judge MacKinnon suggests that it follows from our holding in this case that the Voting Rights Act would be violated by the grant of a building permit for condominiums priced at a range beyond the reach of blacks. Dissent at 21. This would be correct, however, only if a municipality's grant of a building permit were considered a change of voting practices or procedures under the Voting Rights Act. While the Supreme Court has repeatedly held that changing boundary lines by annexations constitutes a change of a "standard, practice, or procedure with respect to voting" under the Voting Rights Act, such that the preclearance requirements of section 5 of the Act must be satisfied, see, *e.g.*, *Perkins* v. *Matthews*, *supra*, 400 U.S. at 388, we are unaware of any decision holding that the grant of a single building permit likewise triggers the preclearance requirements of the Act. Because of the obvious differences between changing boundary lines and granting building permits, we agree with the dissent that it is unlikely that Congress intended the Voting Rights Act to apply to the latter. However, with respect to Judge MacKinnon's broader point which the building permit example was presumably intended to prove—that neither discriminatory purpose nor an effect on individuals not currently in the particular community are enough—it is, in our view, mistaken. If it could be proved that the decision of a municipality with respect to building permits had as its purpose to keep blacks out of the particular neighborhood, its actions would violate the Fourteenth Amendment. See, *e.g.*, *Dailey* v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) which held that the Fourteenth Amendment was violated by the racially motivated denial of building permit; and *Kennedy Park Homes Assoc., Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1971) where the court, in an opinion by Justice Clark, sustained a finding of violation of the Fourteenth Amendment where officials had rezoned property that had been selected for a housing project and declared a moratorium on new subdivisions in order to deny housing to minority families. See also, *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 264-68 (1979). Similarly, the Fifteenth Amendment is violated by a redefinition of city boundaries which is undertaken for the purpose of depriving blacks of the benefits of residence in a municipality, including, the right to vote in municipal elections. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); see also, *Mobile* v. *Bolden*, 446 U.S. 55 (1979) which, like *Arlington Heights, supra*, emphasized the importance of discriminatory purpose in the context of actions designed to invoke the protection of the Fourteenth or Fifteenth Amendment. On this motion for summary judgment, we must, of course, assume that the plaintiff will be able to prove discriminatory purpose, and it is clear on the basis

It is also noteworthy that the Attorney General, who administers the Voting Rights Act in the first instance, has consistently objected to annexations which were the product of racially selective policies. See Supplemental Memorandum of the United States, pp. 2-4 and attachments. The Attorney General's interpretation of the requirements of the Voting Rights Act is, of course, entitled to considerable deference. See *Perkins* v. *Matthews, supra*, 400 U.S. at 390-94; *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 134 (1978). The Attorney General's objection letters were submitted to and made a part of the record of the Congress[17] at various times, including at the time when Congress recently considered the extension of the Voting Rights Act. See H.R. Rep. No. 97-227, 97th Cong. 2d Sess., p. 13 (1982).[18]

It is thus clear from the precedents (1) that in the context of annexations, the Voting Rights Act applies if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect and (2) that the failure to annex is a violation of the Act provided discriminatory purpose is shown.

This does not mean, of course, that Pleasant Grove or any other community would be required to annex contiguous areas merely because such areas may be inhabited by blacks. But it does mean that a community may not annex adjacent white areas while applying a wholly dif-

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of the precedent cited that, upon such proof, a violation of the Fifteenth Amendment would be established. There is no basis for an interpretation of the Voting Rights Act which would provide fewer protections than those provided by the Fifteenth Amendment, for that Act was enacted pursuant to the power vested in Congress by section 2 of the Amendment to provide *additional* protections in that vital area. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-27, 337 (1966).

[17]Interestingly, a case summary of the Pleasant Grove litigation was included in one of these reports.

[18]For the significance of the reenactment of the statute under conditions where Congress voices its approval of administrative interpretation, see *United States* v. *Sheffield Board of Commissioners, supra*, 423 U.S. at 134.

ferent standard to black areas and failing to annex them based on that discriminatory standard. See *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If a community subject to the Voting Rights Act cannot demonstrate that it is not engaged in such discrimination, the Attorney General and the Court will not grant clearance for the annexation of the white areas.

For the reasons stated, it is this 3rd of August, 1983,

ORDERED That plaintiff's motion for summary judgment and its motion for partial summary judgment be and they are hereby denied.

MacKINNON, *Senior Circuit Judge*, (dissenting): Neither annexation here *changes* the voting rights of a single member of any minority group. Therefore, because there is no change whatsoever in the voting rights of any member of any minority, I cannot agree with the majority that the two annexations at issue in this case are "violation[s] of the [Voting Rights] Act provided discriminatory purpose is shown." Maj. Op. at 13.

The majority opinion refers to three Supreme Court decisions holding certain annexations subject to preclearance under section 5 of the Act, *City of Port Arthur* v. *United States*, 103 S.Ct. 530 (1982); *City of Richmond* v. *United States*, 422 U.S. 358 (1975); *Perkins* v. *Matthews*, 400 U.S. 379 (1971), but in each of those cases the annexations clearly *changed existing voting rights of minorities*. Typical of these is *City of Richmond*, where the Court held:

> Section 5 forbids *voting changes* taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is 'to despoil colored citizens, and only colored citizens, of their *theretofore enjoyed voting rights.*' . . . *An annexation proved to be of this kind* [a change in the voting rights of some minority citizens] and not proved to have a justifiable basis is forbidden by [section] 5 whatever its actual effect may have been or may be.

City of Richmond v. *United States, supra*, 422 U.S. at 378-79 (quoting *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960)) (emphasis added). Thus the principles these cases announce are not applicable to this case where there is no change in the not applicable to this case where there is no change [sic] in the existing voting rights of any single minority individual.

The majority relies upon the following *partial* quotation from *City of Port Arthur*:

> In the *City of Port Arthur, Texas* v. *United States*, 103 S.Ct. 530, 535 (Dec. 13, 1982), the court held that
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> . . . even if [a practical] electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid *if adopted for racially-discriminatory purposes* . . . (emphasis added).

Maj. Op. at 9. In failing to quote the complete sentence the majority grossly misstates the Supreme Court's ruling and asserts that an annexation made with a discriminatory purpose—regardless of effect—violates the Voting Rights Act. *Id.* at 8-9.

The complete quotation from the Supreme Court opinion in *City of Port Arthur* v. *United States, supra*, 103 S.Ct. at 535-36 (emphasis added), reads as follows:

> [E]ven if the 4-2-3 electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid if adopted for racially discriminatory purposes, *i.e., if the majority-vote requirement in the two at-large districts had been imposed for the purpose of excluding blacks from any realistic opportunity to represent those districts or to exercise any influence on council members elected to those positions.*

A fair reading of this sentence does *not* support the asserted position of my colleagues. What the Court is truly

saying is that an electoral scheme will be denied preclearance, even if minority votes are properly represented in the apportionment, *if it is continued with an electoral voting scheme that includes a discriminatory majority voting requirement in at-large districts imposed for the purpose of excluding minorities from any realistic opportunity to represent those districts.* The incomplete quotation from *City of Port Arthur* thus does not fairly represent the factual basis of the decision or the ruling expressed by the Supreme Court.

Perkins v. *Matthews*, 400 U.S. 379 (1971), relied on by the majority, is not contrary. There the annexation increased the number of eligible voters and diluted the weight of minority votes. Neither fact exists here. The Court noted that § 5 of the Voting Rights Act "was designed to cover *changes* having a potential for racial discrimination in voting, and such potential inheres in a *change in the composition of the electorate affected by an annexation.*" *Id.* at 388-89 (emphasis added). Clearly the Court was concerned that "by including certain [actual] voters within the city and leaving others outside" an annexation could serve as a means for a community to discriminate against minority voters *in the community* by changing the composition of the electorate to their detriment. *Id.* at 382 n.4, 388-90. See Maj. Op. at 8-9.

The majority also contends that *City of Lockhart* v. *United States*, 103 S.Ct. 998 (1983) supports its conclusion, but in that case the Supreme Court reversed a three-judge district court panel and "conclude[d] that the *election changes* introduced by the 1973 Lockhart City Charter will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group." *Id.* at 1004. In so holding, the Court adopted the position of Chief Judge Spottswood Robinson of the United States Court of Appeals for the District of Columbia Circuit, who dissented in *Lockhart* because "the voting strength of Lockhart's minorities, whether or not enhanced, would not be diminished one whit." *City of Lockhart* v. *United States*, 559 F. Supp. 581, 595 (D.C.C. 1981)

(S. Robinson, C.J., dissenting) (quoted in *City of Lockhart* v. *United States, supra*, 103 S.Ct. at 1004). As the majority recognizes, the Court did not consider the "purpose" prong of section 5 in *Lockhart* because the district court panel had not reached that issue. See *City of Lockhart* v. *United States, supra*, 103 S.Ct. at 1001 & n.4; Maj. Op. at 9. However, unlike the other cases relied upon by my colleagues, *Lockhart* involved a fact situation where the existing voting rights of minorities were being altered. Judicial decisions such as *Lockhart* which involve factual situations where minority voting rights are changed are simply not applicable to situations where there is no change whatsoever in the existing voting rights of minorities and where any changes which might take place in the future are speculative.

The two annexations at issue in this case simply have not changed the voting rights of minorities. The larger, 1979 annexation involves vacant land and does not change the voting rights of a single person, much less minorities. The smaller, 1971 annexation incorporated one family of approximately fourteen whites into the City. While this annexation results in at least a *de minimus* change in voting rights in the City of Pleasant Grove, it does not change any existing minority voting rights because there are no minority voters in the City or in any of the annexed territory.[1] Since the annexations at issue do not *change* any existing minority voting rights and the Voting Rights Act only applies when there is some "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U.S. 130, 141 (1976), it is my view that the two annexations, one of which is inhabited by one non-minority

[1]I find it significant that the Justice Department failed to object to several annexations of the City of Bessemer, Alabama, because they involved "areas that are not populated or areas the population of which have a most a *de minimus* effect on minority voting strength." Defendant's Supplemental Memorandum, Attachment 6, at 2-3. As the majority recognizes, the Attorney General's interpretation of the Voting Rights Act is "entitled to considerable deference." Maj. Op. at 9.

family, cannot constitute a violation of the Voting Rights Act, regardless of the motives of the City. Accordingly, summary judgment is appropriate.

I do not wish to suggest that the motives of the City of Pleasant Grove are pure. I agree with the majority that, from the facts in the record, "a court could appropriately draw the inference that the City of Pleasant Grove had and has the purpose to discriminate against blacks with respect to voting as [well as] with respect to other subjects." Maj. Op. at 6. There may, in fact, be actionable constitutional violations occurring in the City. See *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960).[2] Such violations are not issues before us.[3] The purpose of § 5 is to prevent communities from avoiding the Act's requirements—elimination of literacy tests and other like voting qualifications—by simply enacting slightly different voting

[2]Of course, *Gomillion* involved the *elimination* of practically all Negro voters from the elective franchise in the City of Tuskegee, Alabama. As the Supreme Court remarked:

> The essential inevitable effect of this redefinition of Tuskagee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident.

Gomillion v. *Lightfoot, supra*, 364 U.S. at 341. *Gomillion*, involving as it does the "unequivocal withdrawal of the vote solely from colored citizens," is a far cry from the annexations at issue here. *Id.* at 346.

[3]I cannot agree with the majority's suggestion that the Voting Rights Act incorporates *all* of the protections of the Fifteenth Amendment, as well as providing "*additional* protections in that vital area." Maj. Op. at 11-12 n.16 (emphasis in original). The Act does provide some additional protections for minority voters; section 5 does so by placing the burden on *municipalities* to demonstrate, *prior* to implementation of changes in the existing voting rights of minorities, that such changes do "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." 42 U.S.C. § 1973(c) (1976). Nothing in the Voting Rights Act, however, imposes the burden on municipalities to *disprove* allegations of violations of the Fourteenth and Fifteenth Amendments of the sort involved in the cases cited by the majority. See Maj. Op. at 11-12 n.16.

qualifications having the same discriminatory impact. *Allen* v. *State Board of Elections*, 344 U.S. 544, 548-50 (1969). Where, as here, an annexation in no way changes existing voting rights of minorities, or even directly involves a single identifiable member of any minority group, the Voting Rights Act is not implicated.

Support for summary judgment in this case is also found in the language of section 5 itself; the statutory scheme does *not* contemplate its application to annexation of vacant property. Section 5 provides:

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group], and *unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure* . . . .

42 U.S.C. § 1973(c) (1976) (emphasis added). The italicized language setting forth the enforcement provision indicate that Congress only intended the Act to apply where individual minority voters were actually involved.

The question in this action is whether the annexation of vacant land to the west and north of the City of Pleasant Grove is a "qualification, prerequisite, standard, practice or procedure" having the purpose or effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group. The mere

annexation of property upon which no voters reside cannot be termed "a qualification, prerequisite, standard, practice, or procedure with respect to voting" because the preclearance and enforcement requirement of § 5 contemplates situations where at least some minority individuals' voting rights are changed by the "qualification, prerequisite, standard, practice, or procedure" at issue. The language of the statute thus implicitly indicates that Congress did not intend section 5 to apply to annexations having no impact on the voting rights of minorities, such as the Western and Glasgow additions to the City of Pleasant Grove.

If the majority's interpretation of the Act were correct, the granting of a building permit by the City of Pleasant Grove for condominiums estimated to sell for $125,000 each could be denied preclearance under section 5 of the Voting Rights Act if non-resident minorities demonstrated that they could not afford to purchase the condominiums. In my view Congress did not intend section 5 to be given such an expanded construction; the intent expressed in the language of section 5 does not support such an interpretation.

I therefore find it necessary to dissent. The majority is attempting to extend the Act to a factual situation to which it was never intended to apply.

APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FILED
October 25, 1985

ORDER

Upon consideration of the evidentiary materials submitted by the parties, the briefs, the arguments advanced at the hearing on June 25, 1984, and the entire record herein, it is this 25th day of October, 1985, in accordance with an Opinion issued contemporaneously herewith

ORDERED that the Court denies plaintiff's request for a declaratory order that the annexations of (1) 40 acres of land inhabited by 14 members of the Glasgow family and known as the "Glasgow Addition" which was adopted by the City of Pleasant Grove on May 3, 1971 pursuant to Ordinance No. 161, and (2) 450 acres of uninhabited land known as the "Western Addition" which was approved by the Legislature of the State of Alabama by Act No. 79-419, and signed by the Governor on July 17, 1979, did not have the purpose of denying or abridging the right to vote of any person on account of race or color in violation of section 5 of the Voting Rights Act of 1965, and

that plaintiff may enforce the aforesaid annexations; and it is

DECLARED that such annexations had the purpose of denying or abridging the right to vote on account of race or color in violation of the Act; and it is further

ORDERED that denial of plaintiff's request is without prejudice to a renewal of the request for preclearance in the event that the City of Pleasant Grove devises and implements a racially non-discriminatory annexation policy.

HAROLD H. GREENE
United States District Judge

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589 ____.

CITY OF PLEASANT GROVE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Filed
December 19, 1985

NOTICE OF APPEAL

Notice is hereby given that the City of Pleasant Grove, plaintiff above-named, hereby appeals to the Supreme Court of the United States from this Honorable Court's decision of October 25, 1985. This appeal is taken under the provisions of 42 U.S.C. §1973c.

Respectfully submitted,

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